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Yong Kim Nyien v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO Q-05(SH)-565–12 OF 2017
ABDUL RAHMAN SEBLI, RHODZARIAH BUJANG AND KAMALUDIN MD SAID JJCA
5 DECEMBER 2018

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Criminal Law — Appeal — Appeal against conviction and sentence — Appellant charged with offence of murder — High Court judge found Exception 1 to s 300 of the Penal Code applied — Appellant was convicted for offence of culpable homicide not amounting to murder and sentenced to 12 years imprisonment — Appellant's submissions focused on private defence — Judicial commissioner's findings were on grave and sudden provocation — Whether court must concentrate on private defence or grave and sudden provocation — Whether appellant entitled to discharge amounting to acquittal if private defence established — Whether there was grave provocation by deceased — Whether binding over under s 294 of the Criminal Procedure Code was the appropriate punishment — Criminal Procedure Code s 294 — Penal Code s 300, Exception 1 to s 300

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This was an appeal against the decision of the High Court. The appellant was a 67 year old man who was charged under s 302 of the Penal Code with the murder of his 46 year old live in mistress in which the High Court judge found on the facts that Exception 1 to s 300 of the Penal Code applied and convicted the accused to culpable homicide not amounting to murder and was sentenced to 12 years imprisonment. It was not disputed that the appellant suffered injuries which PW9 agreed that these could be described as defensive injuries caused by the attack with a wooden stool by the deceased. The appellant had outlined the thrust of the defence as followed: (a) the appellant had no intention of causing the death of the deceased; (b) the accused had exercised his right of private defence; (c) the accused was gravely and suddenly provoked by the deceased; (d) a sudden fight broke out between the deceased and the accused; and (e) the accused was not only unable to measure his blows with the stool but also unable to determine the direction in which his blows with the stool were aimed at due to the fairly dark conditions at the place of the incident. Despite the raising of the above multiple defences, the appellant's counsel's submissions both written as well as oral was centered only on that of private defence which according to him entitled the court to grant the appellant a full discharge and acquittal of the offence. With regards to sentence, the appellant submitted that a binding over under s 294 of the Criminal Procedure Code was appropriate punishment because of the age of the appellant, deteriorating health conditions of the appellant as well as the extenuating circumstances

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under which the offence was committed which was the grave and sudden provocation by the deceased.

Held, affirming the conviction and sentence of the High Court:

(1) Guided by the judgment of the learned judicial commissioner, the petitions of appeal and the oral and written submissions of the parties, the court decided to concentrate on the defence of grave and sudden provocation as found by the learned judicial commissioner and not that of private defence as submitted by the appellant. Further, it was not legally possible for the accused to be given an outright discharge amounting to acquittal even if his right to private defence had been established on a balance of probability. Because the legislative scheme of s 300 read under s 304(a) of the Penal Code gave rise to no interpretation other than with the successful raising of any of the four exceptions to s 300 would render the charge of murder unsustainable but instead was proof beyond reasonable doubt of a charge under culpable homicide not amounting to murder and for which the punishment was provided by s 304(a) of the Penal Code (see para 10).

(2) The court agreed with the learned judicial commissioner that there was indeed a grave provocation by the deceased — not by her scolding or nagging but by her continued attack on the appellant in the kitchen after the initial one in the bedroom. A reasonable man similarly circumstanced would have lost his self-control and retaliated the way the appellant did. The disproportionate retaliation was more of a requirement to the right of private defence not so much that of sudden and grave provocation. The fact that 40 injuries were caused to the deceased did not *ipso facto* be evidence that the provocation was not sufficiently grave enough because the retaliation by the appellant was not to say, taking a weapon such as a pistol or a knife but using a similar weapon that the deceased had used, to wit, a wooden stool (see para 14).

(3) With regards to sentence, what the court must consider was that a life was lost in this incident and the maximum penalty under the law was 30 years imprisonment. The learned judicial commissioner had deemed it fit to not even give half of the maximum despite the fact that it was a conviction entered after a full trial. In view of the advance age of the appellant, his health conditions and his almost two years remand pending the trial before his release on bail, the decision to sentence him to 12 years imprisonment was not one which warranted appellate intervention. A bond of good behaviour for such a serious crime as this in which a life lost would make a mockery of the law (see para 15).

[Bahasa Malaysia summary

Ini merupakan rayuan terhadap keputusan Mahkamah Tinggi. Perayu merupakan seorang lelaki berusia 67 tahun yang dituduh di bawah s 302 Kanun Keseksaan atas pembunuhan wanita simpanannya yang berusia 46 tahun yang mana hakim mahkamah mendapati berdasarkan fakta bahawa Pengecualian 1 kepada s 300 Kanun Keseksaan terpakai dan mensabitkan tertuduh dengan membunuh dengan salah tidak terjumlah kepada pembunuhan dan menjatuhkan hukuman 12 tahun pemenjaraan. Ianya tidak dinafikan bahawa perayu telah mengalami kecederaan yang mana PW9 bersetuju ianya boleh dikatakan sebagai kecederaan membela diri yang disebabkan oleh serangan dengan satu bangku kayu oleh si mati. Perayu telah menghujahkan rangka pembelaan seperti berikut: (a) perayu tiada niat untuk menyebabkan kematian si mati; (b) perayu telah menggunakan hak untuk membela dirinya; (c) tertuduh telah mengalami bangkitan marah besar dan mengejut; (d) satu gaduh gempar telah berlaku antara si mati dan tertuduh; dan (e) tertuduh tidak mampu untuk menilai pukulannya dengan bangku tersebut ditujukan kepada kerana keadaan gelap di tempat kejadian. Walaupun membangkitkan pembelaan di atas, hujahan lisan dan bertulis peguam perayu berketengahkan bela diri peribadi yang mana mengikutnya membenarkan mahkamah untuk memberikan perayu satu pembebasan dan pelepasan atas kesalahan. Berkenaan dengan hukuman, perayu menghujuhkan satu bon berkelakuan baik di bawah s 294 Kanun Tatacara Jenayah adalah satu hukuman yang sesuai kerana umur perayu, keadaan kesihatan yang makin merosot dan juga keadaan lain di bawah mana kesalahan telah dilakukan iaitu bangkitan marah besar dan mengejut oleh si mati.

Diputuskan, mengekalkan sabitan dan hukuman Mahkamah Tinggi:

(1) Berpandukan keputusan pesuruhjaya kehakiman terpelajar, petition rayuan dan hujahan bertulis dan lisan pihak-pihak, mahkamah membuat keputusan untuk memberi perhatian kepada pembelaan kebangkitan marah besar dan mengejut sepertimana didapati oleh pesuruhjaya kehakiman terpelajar dan bukannya pembelaan peribadi yang dihujahkan oleh perayu. Lanjutan itu, ianya adalah mustahil secara undang-undang untuk perayu dilepaskan dan dibebaskan atas imbangan kebarangkalian. Kerana skim perundangan s 300 dibaca bersama s 304(a) Kanun Keseksaan hanya membangkitkan tafsiran sekiranya berjaya membangkitkan mana-mana pengecualian satu daripada empat pengecualian kepada s 300 akan menyebabkan pertuduhan bunuh tidak boleh diteruskan akan tetapi membuktikan melampaui sebarang keraguan munasabah untuk satu pertuduhan di bawah membunuh dengan salah tidak terjumlah kepada bunuh yang mana hukuman diperuntukkan oleh s 304(a) Kanan Keseksaan (lihat perenggan 10).

(2) Mahkamah bersetuju dengan pesuruhjaya kehakiman bahawa

A sememangnya wujud bangkitan marah besar dan mengejut oleh si mati — bukan dari marahan dan leteran akan tetapi dari serangan berterusan ke atas perayu dalam dapur selepas yang awal di bilik tidur. Seorang yang munasabah dalam keadaan yang sama akan hilang kawalan dirinya dan membalas dengan cara yang dilakukan oleh perayu. Balasan tidak B setimpal adalah lebih kepada keperluan hak bela diri peribadi dan bukannya bangkitan marah besar dan mengejut. Fakta berkenaan 40 kecederaan yang disebabkan oleh si mati tidak *ipso facto* menjadi C keterangan bahawa bangkitan marah tidak besar dan mengejut kerana balasan oleh perayu bukannya mengambil senjata seperti pistol atau pisau akan tetapi menggunakan senjata yang sama dengan apa yang digunakan oleh si mati, sebagai contoh satu bangku kayu (lihat perenggan 14).

D (3) Berkenaan dengan hukuman, mahakmah harus menimbangkan adalah satu nyawa telah hilang dalam insiden ini dan hukuman maksimum dibawah undang-undang adalah 30 tahun pemenjaraan. Persuruhjaya kehakiman terpelajar telah mendapati bahawa ianya sesuai untuk tidak memberikan separuh daripada hukuman maksima walaupun fakta E menunjukan bahawa sabitan dilakukan selepas perbicaraan penuh. Memandangkan usia lanjut perayu, keadaan kesihatannya dan tempoh hampir dua tahun reman menantikan perbicaraan sebelum dia dilepaskan atas jaminan, keputusan untuk menghukumnya kepada 12 tahun pemenjaraan adalah satu yang tidak memerlukan campur tangan F rayuan. Satu bon berkelakuan baik untuk satu kesalahan yang serius yang menyebabkan kehilangan nyawa adalah satu penghinaan kepada undang-undang (lihat perenggan 15).]

Notes

G For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 45–101.

Cases referred to

Che Omar bin Mohd Akhir v PP [2007] 4 MLJ 309, FC (refd)
H *Daud Pasarrin v PP* [2016] 5 MLJ 374; [2016] 10 CLJ 32, CA (refd)
Ikau anak Mail v PP [1973] 2 MLJ 153, FC (refd)
Lorensus Tukan v PP [1988] 1 MLJ 251; [1988] 1 CLJ 162, SC (refd)

Legislation referred to

I Criminal Procedure Code s 294
Penal Code ss 300, 304, 304(a)

Ranbir Singh Sangha (Ranbir S Sangha & Co) for the appellant.
Norinna bt Bahadun (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Rhodzariah Bujang JCA:

[1] The appellant, a 67 year old man and a vegetable seller at the material time of the offence, was originally charged with murder of his 46 years old lived-in mistress, a Chinese national at his house at Liteview Garden, Jalan Airport, Miri, Sarawak. The charge against him, in Bahasa Malaysia reads:

> Bahawa kamu pada 14/12/2015 jam lebih kurang antara 0200 pagi hingga 0230 pagi di alamat L11612 Jalan Airport Liteview Garden 98000 Miri dalam daerah Miri, dalam negeri Sarawak, untuk meneruskan niat kamu telah membunuh Long Lifang (pasport no:E 1967234) seorang warganegara People's Republic of China dan oleh yang demikian, kamu telah melakukan satu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan).

[2] After a full trial, the learned judicial commissioner (as His Lordship then was) found on the facts that Exception 1 to s 300 of the Penal Code applies and convicted the accused of culpable homicide not amounting to murder. He was sentenced to 12 years imprisonment but was a free man pending his appeal, as well as that of the public prosecutor's (the respondent) against the conviction and sentence because a stay of execution of the sentence was allowed by the learned judicial commissioner. Although we confirmed both the said conviction and sentence after hearing both the appellant's and the public prosecutor's respective appeals, the appellant still remained a free man pending his as well as that of the public prosecutor's further appeals to the Federal Court against the same for we too granted stay of execution on the same terms as those imposed by the learned judicial commissioner.

THE TRIAL

[3] At the outset, it is best to state that there were no eye-witnesses to the crime. It was the accused's own action in going over to his brother's house, nearby his own, at 2.30am that same morning which prompted his brother, his nephew, his grandson and his brother's son-in-law, one Liew Sin Kiong ('PW2') to go over to his house and where they saw the deceased body lying in a pool of blood on the kitchen floor with a broken stool by her side. They all trooped there because, according to PW2, the appellant told his father in law, that is, the appellant's brother, that his house was broken into by thieves. PW2 said when he saw the appellant, there was blood on his head but he was not sure if it was bleeding. The appellant agreed in cross-examination that he was in a state of panic and trauma. PW2 then proceeded to call the emergency line 999 and this was received by Corp Ramesh a/l Doraisamy ('PW3') who then lodged a police report (exh P7). The appellant was subsequently arrested by ASP Soliment Nyian ('PW5') at 3.45pm on the same day. One ASP Thomas Sulok ak Ulik ('PW11') was assigned to be the investigating officer of the case and he arrived at the scene at 5am that morning where other police personnels

A including PW5 were already gathered there. He saw the deceased still lying in a pool of blood at the kitchen. Around and behind the deceased were broken pieces of wooden stool and he saw two broken stools which he believed were the murder weapon. PW11 also saw blood stained footprints in the kitchen. His examination of the master bedroom also revealed a wooden stool on the
B bed and upon further physical examination of the house he concluded that there was no forced entry into the house.

[4] On 15 December 2015 at 12.31pm PW11 recorded a statement from
C the appellant (exh D5 at pp 740–743 of AR Vol 3(2)) who told him that an intruder came to the house and hit him with a wooden stool and likewise did the same to the deceased. They both struggled with the intruder in the kitchen area and it was the intruder who bashed up the deceased. PW11 concluded in his witness statement that he doubted the appellant's story about the intruder
D based on the evidence he saw in the house. His opinion was justified because two days later, the appellant whilst being questioned by him admitted in his statement (exh D6) at pp 744–747 of the same appeal record ('AR') in gist that he quarrelled with the deceased and hit her with a wooden stool in retaliation to her attacks on him with also a stool after he refused to give her money
E (RM4,000) to purchase an airline ticket to go back to China. This version was infact reiterated in his sworn evidence before the court.

[5] The quarrel over the request by the deceased for the said RM4,000 started, said the appellant, the night before when they went to bed and resumed
F after they got up at 2.10am in the morning. That was when the deceased, according to him, threw a wooden stool at him and when he went downstairs to the kitchen she continued the attack chasing him round and round the table with another wooden stool. It was there in the kitchen that he retaliated with his own wooden stool, which light was not switched on but was dimly lighted
G from that of his neighbour's house coming through from the window. The pathologist ('PW9') testified that the deceased suffered altogether 40 injuries on her body caused by blunt force trauma as a result of being hit by a blunt object such as wood, iron or similar object. The fatal injuries were those to the head which led to subdural haemorrhage.

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The above was just a brief summary of the evidence adduced by both the prosecution and the defence, necessary for the purpose of this appeal.

[6] It was not disputed that the appellant himself suffered injuries as shown
I in the photographs taken of him and exhibited as exh P5 (at pp 13–16) and when shown these photographs PW9 agreed that these could be described as defensive injuries. PW11 himself also agreed in his evidence at pp 304–305 of the AR (Vol 2(2)) that there was swelling on the appellant's upper and lower eye lid, a stitched up wound on his head, an injury to his abdomen and swelling on

his left hand and middle finger caused by the attack with a wooden stool by the deceased. Although the defence did not call the doctor who treated the accused to testify but the medical report from Miri Hospital which shows the admission date and time as 14 December 2015 at 3am was produced as prosecution's exh P67 (at pp 730–731 of AR (Vol 3(2)).

[7] The learned judicial commissioner after evaluating the defence made these findings and conclusion at paras 40–45 of the judgment:

> [40] The accused could not have intended to kill the deceased as the incident happened very fast and there was no lapse in time that the accused could have premediated the deceased's death. The court is entitled to consider not only the immediate act that caused the death but all relevant circumstances that preceded or surrounded that act. There was no reason for the accused to have attacked the deceased but he had done so due to the grave and sudden provocation to the point of losing his self-control and hit the deceased repeatedly. Other than that, their relationship had always been loving and cordial prior to this incident and there was not complaint of any abuse by the deceased towards the accused (*Rikky Purba v Public Prosecutor* [2014] 4 MLJ 569; [2014] 3 CLJ 607).
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> [41] The accused said he reacted after he felt pain all over his body and the bleeding from the wound at his forehead. The provocation was in the form of physical attacks by the deceased with a wooden stool and it was sudden and grave. It was the deceased who had followed the accused from their bedroom upstairs to the kitchen downstairs where she hit the accused on his head and continue pursuing him.
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> [42] The prosecution submitted that the accused could easily run away to avoid from the deceased's attacks instead of staying put and hitting her back. In my view, this is not possible because the deceased was so closely behind him, armed with the wooden stool and hitting at him. Further at the age of 67 years old and having a spine problem with metal implants planted therein, the accused could not have run or walk faster compared to the 46 years old deceased.
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> [43] The fact that there were 40 injuries sustained by the deceased has not really affected the accused defence of grave and sudden provocation because the actions of the deceased had led the accused to have an inability to exercise self-restraint or to judge the situation with insight and balance. From the evidence adduced, the accused said that he could not see clearly as the light was not bright and he was only lucky that his blows in the dark hit the deceased, otherwise, he could have been hit badly by the deceased and become the victim of the murder instead.
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> [44] I am therefore satisfied that the acts of the accused were as a result of such provocative acts of the deceased and fell squarely within the Exception 1 to s 300 of the Penal Code.
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> [45] Having evaluated the evidence at the end of defence case on the required standard of proof, I find that the accused is guilty of the lesser offence of culpable homicide not amounting to murder under s 304(a) of the Penal Code and I convict him on this finding accordingly.

A THE APPEAL

[8] In his written submission before us learned counsel for the accused, Mr Ranbir Singh outlined the thrust of the defence at para 3.12 as follows:

B (i) that the accused had *no intention* of causing the death of the deceased;

(ii) that the accused had exercised his *right of private defence*;

(iii) that the accused was *gravely and suddenly provoked by the deceased*;

(iv) that a *sudden fight* broke out between the deceased and the accused; and

C (v) that the accused was not only unable to measure his blows with the stool but also unable to determine the direction in which his blows with the stool were aimed due to the fairly dark conditions at the place of the incident.

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[9] Yet despite the raising of the said multiple defences under the law, his submissions both written as well as oral was centered only on that of private defence which according to him entitles the court to grant the appellant a full discharge and acquittal of the offence.

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[10] All three defences as highlighted in paras (ii)–(iv) above are specifically provided under Exception 1 (grave and sudden provocation), Exception 2 (private defence) and Exception 4 (sudden fight) to s 300 of the Penal Code and they each have their own legal requirements as specified in the aforesaid F provisions before they could be successfully raised by an accused. Guided by the judgment of the learned judicial commissioner, the petitions of appeal and submissions (both oral and written) of the respective parties, we would be concentrating on the defence of grave and sudden provocation as found by the learned judicial commissioner and not that of private defence by the accused. G This is simply because we are of the view that it is not legally possible for the accused to be given an outright discharge amounting to acquittal even if his right to private defence had been established on a balance of probability. We say this because the legislative scheme of s 300 read under s 304(a) gives rise to no interpretation other than this — which is that the successful raising of any of H the four exceptions to s 300 would render the charge of murder unsustainable but instead is proof beyond reasonable doubt of a charge under culpable homicide amounting to murder and for which the punishment is provided by s 304(a).

I **[11]** In other words, the said four exceptions are complete defences for murder but not for culpable homicide not amounting to murder upon which an accused is entitled to an outright acquittal. This we say despite the fact that s 96 of the Penal Code provides that nothing is an offence which is done in the exercise of the right of private defence for again, this provision must be read

with the express provision of s 300, in particular the opening words to each of the Exceptions, to wit 'Culpable homicide is not murder if …' and that of s 304 that is 'Whoever commits culpable homicide not amounting to murder shall be punished …'. Thus, even if we agree that private defence has been successfully raised by the accused, he still must be convicted and punished for culpable homicide not amounting to murder.

GRAVE AND SUDDEN PROVOCATION

[12] The Supreme Court decision in *Lorensus Tukan v Public Prosecutor* [1988] 1 MLJ 251; [1988] 1 CLJ 162 has laid down the test to be applied in considering whether the said defence has been successfully raised and this has consistently been applied by our courts. It is couched in the following terms:

> The test of 'grave and sudden' provocation is whether a reasonable man, belonging to the same class of society as the accused, placed in the situation in which the accused was placed would be so provoked as to lose his self-control (see *Nanavati v State of Maharashtra* and was in fact used by the learned judge in his address to the assessors. Although there was no attack at the manner the learned judge had dealt with the law on provocation in his summing-up to the assessors, but, in our opinion, he had seriously misdirected himself in the application of the law to the facts of the case. In our judgment, the learned judge erred when he treated it as a matter of law when he should have regarded it as a question which according to law is to be deemed to be a question of fact on the issue whether the facts adduced amounted to grave and sudden provocation to reduce the offence from amounting to murder. Secondly, instead of applying the test of a reasonable man as propounded in *Nanavati* case and which he himself had adopted in his address to the assessors, the learned Judge appeared to use a different test, that of the trial court. In our judgment, this is a very grave misdirection. For what a reasonable man will do in certain circumstances depends upon the customs, manners, way of life, traditional value, etc. In short, the cultural, social and emotional background of the society to which an accused belongs. Since the learned judge does not appear to be of the same race as the appellants we think it was wrong for him to disregard the test laid down in *Nanavati* case and the opinion of the second assessor, who belongs to the same race as the appellant. As Lord Goddard correctly observed in *Kwaku Mensah* case at p 93:
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> > The tests have to be applied to the ordinary West African villager, and it is on just such questions as these that the knowledge and common sense of a local jury are invaluable.

It all boils down to, as stated by the Federal Court in *Ikau anak Mail v Public Prosecutor* [1973] 2 MLJ 153 to what we would simplify as a reasonable man test. The passage in the said judgment reads as follows:

> To succeed in a defence of grave and sudden provocation, it is necessary in law for the defence to satisfy the court that *not only by the act of the deceased that the accused had been deprived of the power of self-control but such acts of provocation would also*

have deprived a reasonable man of the power of self-control.

[13] The learned deputy public prosecutor submitted that the accused had not established the said defence because although the provocation was sudden, it was not grave. The scoldings by the deceased and the asking for money would not have caused a reasonable man to lose his control to the point of being violent and from his own evidence the appellant said the deceased hit him twice, the first blow was blocked by him but not the second one. Nonetheless his subsequent retaliation was violent and brutal. He had caused 40 injuries to the deceased and his reaction was disproportionate to the attack by the deceased. Further, he submitted that the accused's caution statement (exh D6), contain factual omissions as opposed to his testimony in court and which the learned judicial commissioner did not consider particularly that the deceased had taken and hit him first with the stool when they were in the bedroom. However, we say, with respect that the said omission could be explained because as rightly pointed out by learned counsel for the appellant, PW11 in his cross-examination at p 325 lines 5–7 of AR (Vol 2(2)), agreed that not the entire information given by the accused was recorded by him in exh D6. Further, as shown in the photograph No 31 of the master bedroom (at p 471 of AR (Vol 3(1)), taken the very morning of the incident, there was clearly a stool lying on the bed in the bedroom which evidence lends credence to the accused's testimony that he was first attacked by the deceased in the bedroom.

[14] Considering the above evidence and having examined the evidence of the appellant, the undisputed fact that he has suffered the injuries as noted in the medical report and as rightfully conceded by the learned deputy public prosecutor that there was sudden provocation, we are of the same view with the learned judicial commissioner that there was indeed a grave provocation by the deceased — not by her scolding or nagging about the money to go back to China but by her continued attack on him in the kitchen after the initial one in the bedroom. Even if the learned judicial commissioner did not expressly state so in his judgment, we are of the view that a reasonable man similarly circumstanced would have lost his self-control and retaliated the way the accused did. The disproportionate retaliation as submitted by the learned deputy public prosecutor is more of a requirement to the right of private defence, not so much that of sudden and grave provocation. Of course as stated in *Ratanlal and Dhirajlal's Law of Crimes* and quoted by this court in *Daud Pasarrin v Public Prosecutor* [2016] 5 MLJ 374 at p 381; [2016] 10 CLJ 32 at p 39, the court may consider, along with other factors, the nature of the retaliation by the accused, having regard to the nature of the provocation. This position in law has in fact been endorsed by the Federal Court in *Che Omar bin Mohd Akhir v Public Prosecutor* [2007] 4 MLJ 309 at p 317, para [17] of the same judgment. Here the fact that 40 injuries were caused to the deceased in the heat of the moment does not *ipso facto*, be evidence that the provocation

was not sufficiently grave enough because the retaliation by the accused was not to say, taking a weapon such as a pistol or a knife to attack the deceased but using a similar weapon that she had used, to wit, a wooden stool. This is supported by the fact, from the evidence of PW11 as stated earlier, that two broken wooden stools were found in the kitchen. It is probable, as submitted by the defence that so many injuries were caused because the kitchen was dimly lighted and the accused was merely swinging the stool wildly at the deceased. The fact that a four-legged stool was the weapon used gives further justification to the number of injuries caused because the impact it had on the body would most probably be multiple, compared to say a weapon like a piece of wood or a parang for one strike would cause one injury and therefore the number of injuries would be evidence of the number of strikes or blows inflicted on the body.

[15] Thus, for all the reasons stated above, we have decided to affirm the decision of the learned judicial commissioner on the conviction and likewise the sentence. In respect of the latter we wish to make it clear that the learned deputy public prosecutor in both his oral and written submissions before us did not address on the inadequacy of the sentence even though it was one of the points raised in their petition of appeal but the learned counsel for the appellant. He said as he did before the judicial commissioner that a binding over under s 294 of the Criminal Procedure Code was appropriate punishment because of the age of the accused, deteriorating health conditions as itemised at p 35 of his written submission, such as benign prostrate hypertrophy, type 2 diabetes and hypertension with chronic renal failure as well as the extenuating circumstances under which the offence was committed which was the grave and sudden provocation by the deceased. However, that last point has already been factored into the conviction for the lesser charge and we do not think it should be used to reduce the sentence further. What we must consider is that a life was lost in this incident and the maximum penalty under the law was 30 years imprisonment. The learned judicial commissioner had deemed it fit to not even give half of that maximum despite the fact that it was a conviction entered after a full trial. In view of the advance age of the accused, his health conditions and his almost two years remand pending the trial before his release on bail, the decision to sentence him to 12 years imprisonment was in our view not one which warranted our intervention. A bond of good behaviour for such a serious crime as this in which a life was lost would, with respect to learned counsel, make a mockery of the law.

Conviction and sentence of High Court affirmed.

Reported by Izzat Fauzan